IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL B.L. HEPPS, ESQ.	:	**CIVIL ACTION**
& JUDY HEPPS	:	
	:	
v.	:	
	:	
GENERAL AMERICAN LIFE INSURANCE,	:	
PAUL REVERE LIFE INSURANCE CO.,	:	
ROWLAND RICKETTS, WILLIAM KASALKO,	:	
ROY MIDDLETON, SUZANNE LeLAURIN,	:	
RODERICK BOGGS & THADDEUS SWANK	:	**NO. 95-5508**

MEMORANDUM and ORDER

Norma L. Shapiro, J. **September 1, 1998**

Plaintiffs Michael B.L. Hepps, Esq. ("Hepps") and Judy Hepps ("Mrs. Hepps"), alleging breach of contract, civil RICO, anticipatory repudiation, intentional infliction of emotional distress, civil conspiracy, violation of the Pennsylvania Unfair Trade Practices & Consumer Protection Law ("UTPCPL"), bad faith and loss of consortium, filed this action against defendants General American Life Insurance ("General American"), Paul Revere Life Insurance Company ("Paul Revere"), Rowland Ricketts ("Ricketts"), William Kasalko ("Kasalko"), Roy Middleton ("Middleton"), Suzanne LeLaurin ("LeLaurin"), Roderick Boggs ("Boggs") and Thaddeus Swank ("Swank"). Defendants, alleging breach of contract, negligent or intentional misrepresentation and insurance fraud, filed a Counterclaim against Hepps. Defendants have filed a motion for summary judgment on the Complaint and partial summary judgment on the Counterclaim. Plaintiffs have filed a cross-motion for summary judgment on the

Counterclaim and partial summary judgment on the Complaint. For the reasons stated below, plaintiffs' motion will be denied and defendants' motion will be granted in part and denied in part.

BACKGROUND

In November, 1988, Hepps purchased a disability insurance policy from General American. On the application form, Hepps stated he was a "trial lawyer"; his exact duties were to "advise clients and to sue or defend." Defendants do not dispute that Hepps was insured as a "trial lawyer," defined as one who must be able to "advise clients and to sue or defend." The insurance policy contains an incontestability clause consistent with Pennsylvania law that prevents defendants from contesting the policy because of statements contained in the application form after it has been in effect for two years. See 40 Pa. Stat. Ann. § 510(c). The policy provides benefits only for total disability, not partial or residual disability.

Between 1988 and 1993, Hepps paid the policy premiums. Hepps developed tinnitus, a loud ringing in his ear; he contended he was totally disabled from the tinnitus and unable to perform his duties as a "trial lawyer" as defined in his insurance application. On October 5, 1993, he submitted a claim form for disability payments; in the claim form, he included "preparing for trial" in his duties as a "trial lawyer." General American began paying Hepps $10,000 per month while investigating his

claim; Hepps was paid a total of $90,000 in benefits.

The policy defines "total disability" to mean that "as a result of Sickness or Injury or a combination of both, you are unable to perform the material and substantial duties of your regular occupation at the start of your Disability." General American's claims examiner wrote to Hepps requesting additional information about his duties at the onset of his tinnitus, to determine the "material and substantial duties" of his occupation as a trial attorney. Specifically, General American requested "a detailed list of your exact job duties as a trial attorney and the percentage of time spent on each duty for any given week." General American also requested documents showing "the percentage of time that you spend [sic] in court for the period of January 1990 through the present date, the actual court dates, and the jurisdictions [in which] you tried these cases."

Hepps replied to these requests by stating that he had performed "an exhaustive effort" trying to obtain the information sought by General American. Hepps reported that "no information prior to 1993 exists," because his records were retained only until a case was closed. Hepps stated he had "stopped trying cases" in early 1993.

General American eventually stopped making disability payments to Hepps on the grounds that he was not "totally disabled" as required under the policy because he was still

"advising" clients and helping them prepare for trial, even if he was not appearing in court on their behalf. Paul Revere subsequently took over administration of Hepps' claim under the General American policy.

Hepps filed this action against General American, Paul Revere and the individual defendants, all agents of the insurance companies, alleging: 1) the right to a declaratory judgment that defendants were breaching the insurance policy; 2) civil RICO violations; 3) civil RICO violations; 4) civil RICO violations; 5) damages for breach of contract; 6) anticipatory repudiation; 7) intentional infliction of emotional distress; 8) civil conspiracy; 9) UTPCPL violations; 10) bad faith; and 11) loss of consortium.[1] The court dismissed the anticipatory repudiation claim (Count VI) and severed and stayed the following claims: civil RICO (Counts II, III IV); civil conspiracy (Count VIII); and UTPCPL (Count IX). Discovery proceeded on: breach of contract (Count V); intentional infliction of emotional distress (Count VII); bad faith (Count X); and loss of consortium (Count XII).

Defendants filed a Counterclaim alleging: 1) breach of contract; 2) negligent or intentional misrepresentation; and 3) insurance fraud under 18 Pa. Cons. Stat. Ann. § 4117.

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[1] The loss of consortium was erroneously labeled Count XII in the Amended Complaint; there is no Count XI.

During Hepps' deposition, he admitted that his office did, in fact, store records from cases prior to 1993 in his basement and with Pierce Leahy archives, contrary to his representation to the General American claims examiner. Hepps also produced, during discovery, a list containing every case handled by his law firm; this contradicted his earlier statement to General American that he had no recollection of the cases he had tried, the dates or jurisdictions involved. Hepps also admitted he had arbitrated two cases during 1993 and won both claims; General American claims this contradicts his statement that he had "stopped trying cases" in the beginning of 1993.

Defendants move for summary judgment on Count III of the Counterclaim for violations of the Pennsylvania insurance fraud statute and on the remaining claims of the Complaint. Plaintiffs move for summary judgment on the entire Counterclaim and on Count I of their Complaint seeking a declaratory judgment.

DISCUSSION

I. Standard of Review

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant moving for summary judgment bears the initial

burden of demonstrating there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

Rule 56(e) requires the presentation of evidence "as would be admissible" at trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 327; see, e.g., J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1542 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991). The non-moving party cannot rest upon conclusory allegations and unsupported speculation. See Medina-Munoz v. R.J. Reynolds Tobacco, 896 F.2d 5, 8 (1st Cir. 1990); Barnes Foundation v. Township of Lower Merion, 982 F. Supp. 970, 982 (E.D. Pa. 1997). The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 248.

II. Counterclaim

In Count III of the Counterclaim, defendants allege Hepps committed insurance fraud. An individual commits insurance fraud if he "knowingly and with the intent to defraud any insurer or self-insured, presents or causes to be presented to any insurer or self-insured any statement forming a part of, or in support of, a claim that contains any false, incomplete or misleading information concerning any fact or thing material to the claim." 18 Pa. Cons. Stat. Ann. § 4117(a)(2). The fraud may relate to any statement material to the claim; it need not be a misstatement in the application form.

"An insurer damaged as a result of a violation of this section may sue therefor in any court of competent jurisdiction to recover compensatory damages, which may include reasonable investigation expenses, costs of suit and attorney's fees. An insurer may recover treble damages if the court determines that the defendant has engaged in a pattern of violating this section." 18 Pa. Cons. Stat. Ann. § 4117(g).

Defendants assert Hepps violated the statute by: 1) presenting false, incomplete or misleading statements to General American; 2) that were material to the claim; and 3) knowingly

and with an intent to defraud. Hepps has conceded under oath that he made misrepresentations regarding the availability of files and lists of cases in which he was involved. A statement is material if it "concerns a subject relevant and germane to the insurer's investigation as it was then proceeding," or "if a reasonable insurance company, in determining its course of action, would attach importance to the fact misrepresented." Parasco v. Pacific Indemnity Co., 920 F. Supp. 647, 654 (E.D. Pa. 1996). In order to determine whether Hepps was capable of continuing to perform his duties as of the onset of his disability, it was essential for General American to explore Hepps' past work and performance. Documents pertaining to that information were material. These misrepresentations were material to his claim for total disability.

The issue is whether Hepps had an intent to defraud General American when he made the misrepresentations. When an insured knowingly provides a false statement, fraud is presumed. See Shafer v. John Hancock Mut. Life Ins. Co., 189 A.2d 234, 236 (Pa. 1963); Kizrian v. United States Life Ins. Co., 119 A.2d 47, 49-50 (Pa. 1956). "It is sufficient to show that they were false in fact and that insured knew they were false when he made them." Evans v. Penn Mutual Life Insurance Co., 186 A. 133, 138 (Pa. 1936).

Even if the insured does not admit knowledge of the

statements' falsity at the time they were made, fraudulent intent may be inferred if the facts show the insured had presumptive knowledge. "Where it affirmatively appears from sufficient documentary evidence, that ... false answers are shown to have been given by the insured under such circumstances that he must have been aware of their falsity, the court may direct a verdict or enter judgment for the insurer." Derr v. Mutual Life Ins. Co., 41 A.2d 542, 544 (1945); see Shafer, 189 A.2d at 236.

Hepps stated in his deposition that he misrepresented the availability of case files and trial records because he thought the requests were irrelevant and burdensome. Clearly Hepps had an obligation to investigate the availability of records before reporting to General American that they did not exist. It is possible that Hepps simply assumed the files did not exist and reported the same out of ignorance, rather than actual knowledge that his statements were false. There is a question of material fact whether Hepps knew his statements were false at the time they were made. Plaintiffs' and defendants' motions for summary judgment on Count III of the Counterclaim will be denied.[2]

III. Breach of Contract

In the Amended Complaint, plaintiffs allege breach of

[2] For the same reasons that summary judgment is inappropriate on Count III of the Counterclaim, the court will deny plaintiffs' cross-motion for summary judgment on Count II (negligent/intentional misrepresentation) of the Counterclaim.

contract (Count V)and seek a declaratory judgment that defendants are in breach of contract and must continue total disability payments (Count I). Defendants have moved for summary judgment on both counts; plaintiffs seek summary judgment on Count I only. Defendants contend that, because Hepps committed fraud in filing a disability claim, defendants owe him no benefits under the policy.

Each party to an insurance contract has a duty to act in good faith. See, e.g., Greater N.Y. Mut. Ins. Co. v. North River Ins. Co., 872 F. Supp. 1403, 1408 (E.D. Pa. 1995), aff'd, 85 F.3d 1088 (3d Cir. 1996); Garvey v. National Grange Mut. Ins. Co., No. 95-19, 1995 WL 461228, at *1 (E.D. Pa. Aug. 2, 1995). "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Bethlehem Steel Corp. v. Litton Indus., 488 A.2d 581, 600 (Pa. 1985).

Material misrepresentations by an insured in the submission of a claim are a legitimate basis for its denial. "Under Pennsylvania law an insurance policy is void for misrepresentation when the insurer establishes three elements: 1) the representation was false; 2) the insured knew the representation was false when made or made it in bad faith; and 3) that the representation was material to the risk being insured." New York Life Ins. Co. v. Johnson, 923 F.2d 279, 281 (3d Cir. 1991); see Jung v. Nationwide Mut. Ins. Co., 949 F.

Supp. 353, 356 (E.D. Pa. 1997). Hepps made false representations but whether he knew of the falsity at the time they were made is a question of material fact. The court cannot determine on a motion for summary judgment whether defendants were justified in canceling Hepps' coverage under the policy. Defendants' motion for summary judgment on plaintiffs' breach of contract and declaratory judgment claims (Counts I & V) and plaintiffs' motion for summary judgment on Count I will be denied.[3]

IV. Bad Faith

Plaintiffs claim defendants acted in bad faith in denying coverage under the policy (Count X) in violation of 42 Pa. Cons. Stat. Ann. § 8371.[4]

"Bad faith" on the part on an insurer is any frivolous

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[3] For the same reasons that summary judgment is inappropriate on plaintiffs' breach of contract claim (Count V), the court will deny plaintiffs' cross-motion for summary judgment on defendants' claim for breach of contract (Count I of the Counterclaim).

[4] 42 Pa. Cons. Stat. Ann. § 8371 provides:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer.

> or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.

Polselli v. Nationwide Mut. Fire. Ins. Co., 23 F.3d 747, 751 (3d Cir. 1994). Defendants maintain that Hepps committed claim fraud when he made material misrepresentations in claiming total disability, and those misrepresentations justified cancellation of coverage. Defendants may not have acted in bad faith. Even if Hepps had not made any material misrepresentations, defendants had reason to believe Hepps was not totally disabled by tinnitus and was still performing the substantial elements of his job as a "trial lawyer." But, on the present record on summary judgment, the court cannot say that no reasonable minds could find defendants' cancellation of coverage was in bad faith. Defendants' motion for summary judgment on plaintiffs' bad faith claim (Count X) will be denied without prejudice to a motion for judgment as a matter of law at trial.

V. Intentional Infliction of Emotional Distress

Hepps alleges in Count VII that defendants' cancellation of his disability coverage caused his clinical depression and intentionally inflicted emotional distress. The Pennsylvania Supreme Court has not yet officially recognized the tort of intentional infliction of emotional distress, see Kazatsky v.

King David Memorial Park, Inc., 527 A.2d 988, 989 (1987) (leaving "to another day" whether this cause of action is viable in the Commonwealth), but the Court of Appeals has predicted it will; this court is bound by that holding. See Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 232 (3d Cir. 1995); Silver v. Mendel, 894 F.2d 598, 606 (3d Cir.), cert. denied, 496 U.S. 926 (1990).

To establish liability for the tort of intentional infliction of emotional distress, conduct must be: 1) extreme and outrageous; 2) intentional or reckless; and 3) the cause of severe emotional distress. See Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1273 (3d Cir. 1979) (in banc). The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, as to be regarded as atrocious, and utterly intolerable in a civilized community." Pavlik v. Lane Ltd./Tobacco Exporters Int'l, 135 F.3d 876, 890 (3d Cir. 1998); see Trans Penn Wax Corp., 50 F.3d at 232. Recovery for this tort has been "highly circumscribed." Pavlik, 135 F.3d at 890.

Defendants cancelled Hepps' payments because they believed he had made misrepresentations on his claim form and was capable of performing the substantial duties of his profession. As a matter of law, no reasonable jury could find that defendants' actions, after conducting a methodical nine month investigation during which they paid Hepps $90,000 in benefits, was "atrocious,

and utterly intolerable in a civilized community." Plaintiffs have failed to state intentional or reckless action by defendants sufficiently extreme or outrageous to create liability for intentional infliction of emotional distress.

Plaintiffs' claim also fails for lack of causation. Although the Pennsylvania Supreme Court has not addressed the exact requirements for a claim of intentional infliction of emotional distress, it has held that "at the very least, existence of the alleged emotional distress must be supported by competent medical evidence." Kazatsky, 527 A.2d at 197. A plaintiff must provide "competent medical evidence of causation." Williams v. Guzzardi, 875 F.2d 46, 52 (3d Cir. 1989).

Plaintiffs have produced medical reports from William C. Gray, M.D. ("Dr. Gray"), Robert L. Sadoff, M.D. ("Dr. Sadoff"), Gerald Cooke, Ph.D. ("Dr. Cooke"), and Kenneth S. Rosen, M.D. ("Dr. Rosen"), that Hepps is suffering from emotional agitation and anxiety. Dr. Gray stated in his report that Hepps "expresses great anger at Paul Revere Insurance Company for their behavior toward him." Dr. Cooke reported that Hepps is angry because the insurance companies have not believed him.[5] Although Hepps may

[5] Hepps himself stated in an affidavit that defendants' actions "have caused me severe emotional distress, anxiety, anger, frustration, depression and outrage." Hepps Aff., attached as EX. D to Pltffs.' Brief. Hepps is not a medical expert, so his self-serving opinion does not qualify as "competent medical evidence" of emotional distress.

have been angered by defendants' cancellation of his insurance coverage, the evidence does not support Hepps' contention that defendants' conduct caused him severe emotional distress. Defendants did not cause Hepps' tinnitus, the origin of Hepps' distress and anxiety. Summary judgment will be granted in favor of defendants on plaintiffs' claim for intentional infliction of emotional distress (Count VII).[6]

VI. Loss of Consortium

Mrs. Hepps alleges that defendants' tortious conduct has interfered with her ability to enjoy her husband's companionship. Mrs. Hepps alleges that Hepps "doesn't feel like having any relations with me." She attributes her marital problems to the present lawsuit.

A loss of consortium claim is derivative to the spouse's tort claim. See Little v. Jarvis, 280 A.2d 617, 620 (Pa. Super. 1971). "The consortium claim and the personal injury claim are closely interconnected; together, they represent the total, compensable damages-- direct and indirect-- suffered as a result

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[6] The Pennsylvania Supreme Court has held there is no common law cause of action against an insurer for bad faith in addition to the remedies available under the insurance bad faith statute, 42 Pa. Cons. Stat. Ann. § 8317, and the Unfair Insurance Practices Act, 40 Pa. Stat. Ann. § 1171.1, et seq.. See D'Ambrosio v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 431 A.2d 966 (Pa. 1981). In light of the court's reluctance to recognize common law causes of action against insurance companies, Hepps' cause of action for common law intentional infliction of emotional distress may also be preempted by the insurance bad faith statute.

of the principal plaintiff's injury." Scattaregia v. Wu, 495 A.2d 552, 553 (Pa. Super. 1985). "The consortium plaintiff ... has suffered no direct injury.... [Her] right to recover is derived, both in a literal and legal sense, from the injury suffered by [her] spouse." Id. "Under Pennsylvania law, a wife's consortium claim derives only from the injured husband's right to recover in tort." Wakshul v. City of Phila., 998 F. Supp. 585, 590 (E.D. Pa. 1998) (summary judgment required on loss of consortium claim when principal plaintiff's tort claims dismissed); see Murray v. Commercial Union Ins. Co., 782 F.2d 432, 438 (3d Cir. 1986). "Thus, where the allegedly injured spouse fails to plead a cognizable claim, his spouse's claim for loss of consortium cannot survive." Quitmeyer v. SEPTA, 740 F. Supp. 363, 370 (E.D. Pa. 1990).

Summary judgment will be granted on Hepps' claim for intentional infliction of emotional distress, so there is no underlying tort action upon which Mrs. Hepps may base a loss of consortium claim. Summary judgment will be granted on Mrs. Hepps' loss of consortium claim.

CONCLUSION

There are questions of material fact precluding summary judgment on the breach of contract, bad faith and insurance fraud claims (Amended Complaint Counts I, V & X; Counterclaim Counts I, II & III). Hepps has not produced evidence sufficient to support

recovery for intentional infliction of emotional distress; summary judgment will be granted on that claim (Amended Complaint Count VII). As there is no underlying tort for which Mr. Hepps may recover, summary judgment will be granted on Mrs. Hepps' claim for loss of consortium (Amended Complaint Count XII).[7]

An appropriate Order follows.

[7] Defendants also move for summary judgment on the RICO (Amended Complaint Counts II, III & IV), civil conspiracy (Amended Complaint Count VIII) and UTPCPL claims (Amended Complaint Count IX). Because these claims have been severed and stayed, it would be inappropriate for the court to address the merits of those causes of action at present.

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RODERICK BOGGS & THADDEUS SWANK	:	**NO. 95-5508**

ORDER

AND NOW, this 1st day of September, 1998, upon consideration of defendants' motion for summary judgment, plaintiffs' cross-motion for summary judgment, the responses thereto and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Defendants' motion for summary judgment is **GRANTED IN PART AND DENIED IN PART**.

2. Defendants' motion for summary judgment is **GRANTED** as to Amended Complaint Counts VII (intentional infliction of emotional distress) and XII (loss of consortium).

3. Defendants' motion for summary judgment is **DENIED** as to Amended Complaint Counts I (declaratory judgment), V (breach of contract) and X (bad faith) and Counterclaim Count III (insurance fraud).

4. Plaintiffs' cross-motion for summary judgment is **DENIED**.

Norma L. Shapiro, J.